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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1175

HATZLACHH SUPPLY COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

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1. We note initially that the government concedes here, as it did on rehearing in the Court of Claims, that there is a square conflict between the decision of the Court of Claims and the decision of the Court of Appeals for the Second Circuit in *Alliance Assurance Co. v. United States,* 252 F.2d 529 (2d Cir. 1958). Brief in Opp. pp. 5, 6 and 7.[1] In addition, the Court of Claims' reasoning conflicts with another appellate decision issued within the past few months on the question whether the United States may be sued for damages to detained goods — *A-Mark, Inc. v. United States Secret Service,* No. 77-2152 (9th Cir. Nov. 13, 1978).[2]

[1]The government acknowledges that the small factual differences between the cases would not justify a different result. *Compare* Petition p.5 n.2, *with* Brief in Opp. p.7 n.7.

[2]Because the opinion of the Court of Appeals for the Ninth Circuit has not yet been published, it is reproduced in Petitioner's Appendix E, hereto.

In *A-Mark* the Ninth Circuit has chosen to follow the Second Circuit's decision in *Alliance*.[3]

2. The primary conflict relates to the Court of Claims' reading of an exclusion in the Tort Claims Act, 28 U.S.C. §2680(c) that bars suits "arising in respect of . . . the detention of any goods or merchandise." The court below held that not only are tort suits for alleged illegal detention barred, but also there may be no recovery for loss or other harm to goods. The Court of Claims' reading totally absolves the government of liability for carelessness in handling the property of others in its possession.

The Second and Ninth Circuits in *Alliance* and *A-Mark* did not read the exclusion of liability so sweepingly. Since the preceding section of the Tort Claims Act, 28 U.S.C. §2680(b), expressly bars suits "arising out of the *loss*, miscarriage or negligent transmission" of mail (emphasis added), it is reasonable to assume that, if Congress had wished similarly to bar actions for loss of goods by officials other than Postal Service employees, it could have done so by including the word "loss" in Section 2680(c). The Second and Ninth Circuits concluded that the language of Section 2680(c) was designed only to prevent lawsuits challenging the legality of a detention (*Alliance*, 252 F.2d at 534 (Pet. App. 18a-19a), quoted in *A-Mark* at App. E, 2a-3a):

[3]The government cites four cases which, it says, "have distinguished or rejected" the reasoning of *Alliance*. Of the four, only one — *S. Schonfeld v. SS Akra Tenaron*, 363 F. Supp. 1220, 1223 (D.S.C. 1973) — reached the question whether the United States can be sued for loss or other harm caused to detained property. Two others, *United States v. Articles of Food*, 67 F.R.D. 419, 425 (D. Idaho 1975), and *United States v. One (1) 1972 Wood, 19 Ft. Custom Boat*, 501 F.2d 1327, 1330 (5th Cir. 1974), were for damages resulting from the detention itself, not the handling or subsequent loss of the goods. The remaining case, *Walker v. United States*, 438 F Supp. 251, 258 (S.D.Ga. 1977), held that there was no recovery on an implied contract because no bailment had been created on the facts of that case. Hence, there is only one district court which follows the view of the Court of Claims and two appellate courts which disagree.

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities... [T]he exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities . . . .

Thus both courts held that agencies other than the Postal Service may be sued if they are responsible for injury or loss to detained goods.[4]

3. The Court of Claims reached a second issue not considered in *A-Mark* when it held that Section 2680(c) bars not only tort suits, but also contract suits on the same facts, because to do otherwise would be to "trespass on congressional prerogatives." Pet. App. 5a. Obviously, the Second Circuit held otherwise in *Alliance*, and its conclusion is plainly correct. Section 2680, by its own terms, applies *only* to tort actions and not to contract claims.[5]

[4]The government errs when it says (Brief in Opp. p.6):

> The rule of *Alliance* produces an astonishing result: if the government wrongfully seizes property and then loses it, the owner has no recovery; if the government properly seizes chattels because they are subject to forfeiture and then loses them, the owner . . . can recover.

In fact, *Alliance* and *A-Mark* would permit a suit for damage or loss to detained goods irrespective of the justification for the initial detention.

[5]The list of exceptions contained in Section 2680 is introduced as follows: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . ." "This chapter" refers to the Tort Claims Act. Section 1346(b) provides jurisdiction in the district courts for actions based upon "the negligent or wrongful act or omission" of a federal employee, while Section 1346(a), — not covered by the Section 2680 exceptions — provides jurisdiction in the district courts for actions not exceeding $10,000 and "not sounding in tort."

Moreover, the government concedes that "the Tort Claims Act does not purport to modify the Tucker Act." Brief in Opp. p.5. Hence, an exception to the Tort Claims Act cannot be read to deny redress to an individual for a legitimate contract claim.

The Court of Claims agreed that the applicable statutes and regulations, as well as the government's agreement to return the goods upon payment of the fine, "make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver the goods . . . ."[6] Pet. App. 5a. In its Brief in Opposition, the government has admitted that there was an agreement to return the goods upon payment of the requested amount. Brief in Opp. p.2. Thus there was a valid contract claim.

4. The only reasons offered by the government for leaving this conflict unresolved are the "possibility" that "the Second Circuit would retreat" from the *Alliance* holding and the government's assertion that "situations such as the present [sic] do not arise frequently . . . ." Brief in Opp. p. 7. In view of the Ninth Circuit's concurrence in the result and rationale of *Alliance*, the government's hope that the conflict will disappear seems plainly unjustified.[7] Moreover,

[6]The Court specifically noted the language of 28 U.S.C. §2465:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant . . . .

[7]Although the government contends that *A-Mark* is "incorrectly decided" (Brief in Opp. p.6 n.6), it is evidently content to let stand *A-Mark's* holding that individuals like this petitioner may sue the United States for recovery of damages to detained goods. We have been informed by the Clerk of the Court of Appeals for the Ninth Circuit that the government requested and was granted an extension of time in which to file a petition for rehearing in *A-Mark*, but did not file such a petition. The government should not be permitted to acquiesce in *A-Mark* while, at the same time, denying recovery to petitioner and seeking to sustain the decision below on the ground that it was correctly decided.

the addition of the Ninth Circuit to the conflict among courts pits the Court of Claims, with jurisdiction over contract claims upon the government, against the federal appellate courts on both coasts which have jurisdiction over major import centers responsible for over one-third of the goods imported into this country.[8] This conflict presents a grave risk of unfair and inconsistent judgment on indentical facts. The result below is, in addition, fundamentally wrong. If government employees carelessly lose or damage detained goods, the United States should not be absolved from liability without the clearest indication that this is the Congress' judgment.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[8]*See*, U.S. Department of Commerce, Highlights of U.S. Export and Import Trade, pp. 128-129 (1978).

APPENDIX

APPENDIX E

A-MARK, INC., Plaintiff-Appellant,
v.
UNITED STATES SECRET SERVICE DEPARTMENT OF the TREASURY, Defendant-Appellee.

No. 77-2152

United States Court of Appeals, Ninth Circuit.

Nov. 13, 1978

On Appeal from the United States District Court for the Central District of California.

Before MERRILL, GOODWIN and TANG, Circuit Judges.

PER CURIAM:

This appeal has been taken from an order dismissing the action for lack of subject-matter jurisdiction.

Appellant seeks recovery from the United States under the Tort Claims Act for negligent damage to a rare silver dollar entrusted by appellant to Treasury officials in May, 1971, for authentication as to its genuineness. Appellant alleged that the coin, when given to the government officers was numismatically rated as "brilliant, uncirculated and semiprooflike"; that while in the possession of the government it was severely damaged, resulting in a loss of value in the sum of $29,000.

In August, 1971, a technical consultant to the Director of the Mint examined the coin and gave his opinion that the coin was genuine but that the "S" mint mark was counterfeit. Because of this finding the coin was detained by the United States Secret Service pending investigation into possible fraudulent alteration, mutilation or falsification in violation of 18 U.S.C. § 311. Upon completion of the

investigation, the coin was returned to appellant. This action was brought April 14, 1974.

28 U.S.C. § 2680(c) provides that the Tort Claims Act shall not apply to "Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

The district court concluded that because the alleged damage to the coin occurred after the Secret Service had opened its investigation and during the period of detention of the coin, it has arisen "in respect of" its detention and the exception of § 2680(c) applied. Accordingly the action was dismissed. This appeal followed.

Appellant contends that the exception reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention. We agree. Such was the holding in *Alliance Assurance Company v. United States*, 252 F.2d 529 (2d Cir. 1958). There imported goods were taken into possession by Customs officials for purposes of appraisal. They mysteriously disappeared and the plaintiff sued for their value. The court rejected the government's contention that the claim was barred by § 2680(c), stating:

> "The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities. An examination of the cases in which the exception was asserted reveals that it is normally used to bar actions based upon the illegal seizure of goods. See, e. g., *Jones v. Federal Bureau of Investigation*, D.C., 139 F. Supp. 38, 39; *United States v. One 1951 Cadillac Coupe De Ville*, D.C., 125 F. Supp. 661. That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions 'arising out of the loss, miscarriage, or negligent transmission' of mail. 28 U.S.C.A. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others."

252 F.2d at 534. We agree.[1]

Reversed and remanded for further proceedings.

TANG, Circuit Judge, concurring:

I concur in the result. The majority, following the reasoning of *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2nd Cir. 1958), holds that 28 U.S.C. § 2680(c) excludes only damages arising from the fact of detention itself, not damages due to negligent handling during detention. In my view, a better rationale is to read § 2680(c) as covering only those detentions which occur within the context of customs and tax activities. The governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation. A similar situation

[1] We note that two court of appeals cases holding the section to provide an exemption are distinguishable. *Morris v. United States*, 521 F.2d 872 (9th Cir. 1972), was based not on the detention clause but on the clause relating to assessment and collection of taxes. *United States v. 1500 Cases, More or Less, etc.*, 249 F.2d 382 (7th Cir. 1957), was addressed only to the question whether the detention was wrongful.

often arises when property must be levied against for tax purposes. It follows that where the ultimate act of assessing the tax or duty is rendered exempt, the incidental activity of detention must also be protected. §2680(c) contains parallel clauses which cover "the assessment or collection of *any tax or customs duty*, or the detention of any goods or merchandise by *any officer of customs or excise* or any other law-enforcement officer." (emphasis added). The clauses both dwell exclusively on customs and taxes, except for the final reference to other law-enforcement officers. The "any other law-enforcement officer" phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.

This reading is supported by what little legislative history there is on § 2680(c). The Senate Report to the Legislative Reorganization Act of 1946 had only the following to say about the tort claim exceptions:

> This section specifies types of claim which would not be covered by the title. They include . . . claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers...

S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). *See also Hearings Before House Committee on the Juridicary on H.R. 5373 and H.R. 6463*, 77th Cong. 2d Sess. 44 (1942); Gottlieb, *The Federal Torts Claims Act—A Statutory Interpretation*, 35 Geo. L. Rev. 1, 45 (1946).

It is noteworthy that the report speaks of the detention of goods only by customs officers. If Congress had intended

the exception to extend to detentions by "any law-enforcement officer" outside the area of tax or customs, one would expect a more encompassing explanation.

It is true that the few cases on point have applied §2680(c) to law-enforcement officials other than customs and tax officials. *See, e. g., United States v. 1500 Cases, More or Less, etc.*, 249 F.2d 382 (7th Cir. 1957) (FDA); *United States v. Articles of Food etc.*, 67 F.R.D. 419 (D.Idaho 1975) (same); *Van Buskirk v. United States*, 206 F. Supp. 553 (E.D. Tenn. 1962) (FBI); *Jones v. Federal Bureau of Investigation*, 139 F.Supp. 38 (D.Md 1956). All of these cases, however, relied on language in *Chambers v. United States*, 107 F.Supp 601 (D. Kan. 1952), which was clearly dictum. None of them discuss the legislative history of the statute and only one addresses the issue, and that in dictum. *Van Buskirk v. United States, supra*, 206 F. Supp. at 556. It is submitted that they are wrongly decided and that §2680(c) should be limited to detentions of goods by law-enforcement officers acting in a customs or tax capacity.

Under such an analysis, the detention of the coin here was not for a customs or tax purpose and §2680(c) exception would be inapplicable.